Filed 4/20/12 In re A.F. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.F. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.V., Defendant and Appellant.	E053744 (Super.Ct.Nos. J234944, J234945, J234946, J234947 & J234948) OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed in part, dismissed in part.

Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Kristina M. Robb, Deputy County Counsel, for Plaintiff and Respondent.

M.V., an incarcerated parent, appeals from a disposition order in a juvenile dependency proceeding pursuant to Welfare and Institutions Code section 300. (All statutory citations refer to the Welfare and Institutions Code.) She contends that the juvenile court abused its discretion in failing to order visitation with her four younger children and by delegating sole discretion to San Bernardino County Children and Family Services (CFS) to provide visitation with her oldest child.

We will affirm the order denying visitation with the younger children and will dismiss the appeal with respect to the visitation order pertaining to the oldest child as moot.

FACTUAL AND PROCEDURAL HISTORY

Because of the limited nature of the issue raised on appeal, the customary exhaustive recitation of the underlying facts and procedural stages of the dependency process is unnecessary. Briefly, M.V. (hereafter M.) is the mother of five children—I.M., A.F.-1, A.F.-2, A.F.-3 and B.F.—who were made dependents of the juvenile court in this case.[1] As of June 2, 2011, the date of the disposition order which is at issue on appeal, the children ranged in age from three to 12.

At the contested disposition hearing, the biological father of the four younger children was found to be the presumed father of all five, and the children remained placed

[1] Her parental rights to another child, J.F., were terminated in 2008. J.F. was adopted in 2010.

with a paternal aunt. Reunification services were ordered for the presumed father. The court elected to deny reunification services to M. because she was then incarcerated awaiting trial on multiple felony charges, including carjacking, kidnapping, robbery, false imprisonment and transportation of a controlled substance, and because she had not cooperated with the services which were ordered at the detention hearing.

M. filed a timely notice of appeal from the disposition order.

LEGAL ANALYSIS

1.

INTRODUCTION

The issues we will address arose as follows: After having denied M. reunification services based on the likelihood that she would be serving a lengthy prison term if she were convicted (§ 361.5, subd. (e)(1)), the juvenile court partially granted and partially denied M.'s request for an order for visitation. At a pretrial settlement conference, the court had somewhat reluctantly ordered in-custody visitation with the "older children" only. It did not specify who the "older children" were. At the disposition hearing, after having denied reunification services for M., the court addressed her request for visitation. One of the attorneys reminded the court that there was a prior order for visitation with the oldest *child*. No one disputed that that was in fact the prior order. The court then ordered in-custody visitation with the oldest child, I.M., who was then 12, saying "I don't like the kids seeing the parents in custody. It happens all the time. I understand that. But for me personally – for the oldest child if it can be facilitated, you have authority to do that.

[¶] . . . [¶] . . . I want CFS to facilitate that. . . . It is problematic enough for the caregiver to facilitate that." Counsel for CFS then commented, "What I mean, she might interpret that she could do it every weekend, the caretaker, so CFS would be determining the appropriateness based on the child's emotional response." The court replied, "Yes."

Mother now contends that it was an abuse of discretion not to order visitation with the younger children as well as with the oldest child and that the court abused its discretion because it delegated to CFS the authority to determine whether visits occurred at all, based on the social worker's assessment of the child's emotional reaction.

2.

THE ORDER FOR IN-CUSTODY VISITATION WITH THE OLDEST CHILD IS MOOT

M. contends that the order for in-custody visitation with the oldest child was an abuse of discretion[2] because the juvenile court delegated to CFS all authority to decide whether visitation would occur, depending on the social worker's assessment of the child's emotional reaction. CFS contends that M. forfeited review of her contentions concerning visitation because she did not object to the juvenile court's visitation order during the disposition hearing. We need not address the forfeiture contention because as to this issue, the appeal has been rendered moot by subsequent events.

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[2] To order or deny visitation to an incarcerated parent who has been denied reunification services is within the juvenile court's sound discretion. (§ 361.5, subd. (f); *In re J.N.* (2006) 138 Cal.App.4th 450, 456-458.)

An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404.) "Effective relief" is a remedy which can have a practical, tangible impact on the parties' conduct or legal status. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.) Here, even if the visitation order was an abuse of discretion because it delegated to CFS all authority to decide whether visitation would occur, we could not grant M. any effective relief because the visitation order was based on circumstances which no longer exist.

At the time of the disposition hearing, M. was in local custody at West Valley Detention Center in Rancho Cucamonga, and the juvenile court made its order for in-custody visitation based on that circumstance. After the disposition hearing, M. was convicted on multiple felony counts and was sentenced to 13 years in state prison.[3] She is now, according to information provided to us by her attorney, incarcerated in the state prison at Chowchilla, in central California, a distance of about 300 miles from San Bernardino, according to CFS.[4] This is a circumstance which was not before the juvenile

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[3] M.'s request that we take judicial notice of this court's records in *People v. M[.] V[.]*, case No. E054927 is granted. The clerk's transcript in that case includes an abstract of judgment showing that on November 3, 2011, M. was sentenced to a total term of 13 years in state prison following her conviction on one count of carjacking (Pen. Code, § 215, subd. (a)); two counts of second degree robbery (Pen. Code, § 211); and two counts of false imprisonment (Pen. Code, § 236), along with enhancing allegations on each count pursuant to Penal Code section 12022, subdivision (d) (commission of specified offense with knowledge that another principal was armed with a firearm).

[4] We asked the parties for supplemental briefing on the question of mootness.

court when it made the visitation order. Visitation at a remote location is more problematic than local visitation, involving issues of transportation, who is to accompany the child, and the possible need for overnight stays, given the distance involved. If we were to reverse the visitation order on the grounds M. asserts, the juvenile court would necessarily have to consider the current circumstances and exercise its discretion anew, based on the facts as they now exist.[5] Consequently, reversal would not result in the benefit M. seeks, i.e., an order both requiring visitation with the oldest child and setting a minimum amount of visitation.

3.

THE COURT WAS NOT REQUIRED TO FIND THAT VISITATION WOULD BE DETRIMENTAL TO THE CHILDREN IN ORDER TO DENY VISITATION

The order denying visitation with the younger children is not rendered moot by the change in M.'s location. Accordingly, we will address her contention that the order denying visitation with the younger children was an abuse of discretion as a matter of law because the court failed to make a finding that visitation would be detrimental to the children.[6]

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[5] M. can accomplish the same result by seeking a new visitation order in the juvenile court.

[6] Where no reunification plan is in place, visitation orders are always subject to modification based on the best interests of the children. (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548.) Because M. can seek a new visitation order not only with the oldest child but with all of the children based on current circumstances, we will address this purely legal question, even if it arguably should have been raised first in the juvenile court.

M. contends that section 361.5, subdivision (f) must be read to require a finding of detriment in order to deny visitation to an incarcerated parent who has been denied reunification services. She contends that *In re J.N.*, *supra*, 138 Cal.App.4th 450, in which the court held that no finding of detriment is required if reunification services are denied, was wrongly decided. We agree with the analysis in *In re J.N.*

Section 361.5, subdivision (e)(1) provides that if a parent is incarcerated, the court shall order reasonable services unless the court determines, by clear and convincing evidence, that services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the crime, and the degree of detriment to the child if services are not offered. Reunification services for an incarcerated parent are subject to the time limitations imposed in section 361.5, subdivision (a), and may include, among others, telephone calls and "[v]isitation services, where appropriate." (§ 361.5, subd. (e)(1).)

Section 361.5, subdivision (f) provides that when a court does not order reunification services to a parent under that paragraph, and either sets a section 366.26 hearing or the other parent is being provided reunification services, "[t]he court *may* continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." (Italics added.)

In *In re J.N.*, the court addressed the contention M. raised here, i.e., that section 361.5, subdivision (f) requires that, in order to deny visitation with an incarcerated parent who has been denied reunification services, the court must make a finding by clear and

convincing evidence that visitation would be detrimental to the child. (*In re J.N.*, *supra*, 138 Cal.App.4th at p. 457.) The court concluded that the final sentence of subdivision (f) which we have quoted above does not require visitation unless to do so would be detrimental to the child; rather, it grants permission to the juvenile court to order visitation unless it finds that visitation would be detrimental to the child. As the court observed, "may" does not mean "shall," and the Legislature's use of both "shall" and "may" in the same paragraph in section 361.5, subdivision (f) indicates that the Legislature understood and intended the distinction. (*In re J.N.*, *supra*, at pp. 457-458.) Finally, the court observed that the distinction is logical: Visitation is an essential part of a reunification plan, and must be afforded to an incarcerated parent to whom reunification services are being provided, unless visitation would be detrimental to the child. Where reunification is denied, visitation is not integral to the overall plan. The court found that "[t]his reality is reflected in the permissive language of section 361.5, subdivision (f)." (*In re J.N.*, *supra*, at pp. 458-459, fn. omitted.)

For the reasons stated in *In re J.N.*, *supra*, 138 Cal.App.4th 450, the juvenile court in this case did not abuse its discretion in denying visitation with the younger children without having found that visitation would be detrimental to them.

DISPOSITION

The appeal is dismissed with respect to the order granting visitation with the minor, I.M.

The order denying visitation with the minors A.F.-1, A.F.-2, A.F.-3 and B.F. is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.